Office of the Saskatchewan Information and Privacy Commissioner May 2010

FOIP FOLIO

COMMISSIONER DISMISSES 95 REVIEWS AS VEXATIOUS AND MADE IN BAD FAITH

Saskatchewan Commissioner **Gary Dickson** posted his Review Report F-2010-002 on May 26, 2010. This Report addressed 95 different requests from the same individual for review of access denial by five different government institutions (Advanced Education, Employment and Labour; Executive Council; Justice and Attorney General; Saskatchewan Labour Relations Board; and, the Saskatchewan Workers' Compensation Board).

The Commissioner found that:

1. He was prohibited from releasing records in his office's possession for purposes of the 95 reviews;

2. Four of the five government institutions failed to provide notification to the Applicant as required by *The Freedom of Information and Protection of Privacy Act* (FOIP); and,

3. The 95 reviews should be dismissed on the basis that they were vexatious and not made in good faith.

The Commissioner also recommended that the Legislative Assembly amend FOIP so that the Commissioner could, in the future, authorize a public body to disregard requests for access that are frivolous, vexatious or not made in good faith. The Report is available at our website: www.oipc.sk.ca under the *Reports* tab.

INSIDE THIS ISSUE

Commissioner Dismisses 95 Reviews as Vexatious and Made in Bad Faith.....1

Canadian Newspaper Association Survey Ranks SK Number One.....2

More Changes in Canada's Access—Privacy Oversight Community.....2

Privacy and Security Conference Set for September 2010.....3

DOCUdavit Update.....3

SK Hospital Fundraising Regulation.....3

Personal Health Records.....4

Draft Privacy Legislation in U.S.A. Congress.....4

YK Commissioner Leads Access & Privacy Amendments..5

Australia Law Reform Efforts.....5

Police Promote Greater Transparency in Waterloo, ON.....5

BC Announces Gunshot and Stab Wound Disclosure Act...6

Maybe the Apparent Generation Gap Over Privacy and Social Networking Sites is Exaggerated.....6

New Approach to Protecting Personal Health Information..7

Yet More Personal Health Information News.....7

Mark Your Calendar.....8

CANADIAN NEWSPAPER ASSOCIATION SURVEY RANKS SASKATCHEWAN NUMBER ONE

In May, the Canadian Newspaper Association (CNA) released its National Freedom of Information Audit 2009-2010. This Audit is available online at http://www.cna-acj.ca/en. That Audit report also includes details of the information requested and the grading criteria. The grade was based on speed and completeness of the disclosure. The faster and more complete the disclosure, the more points the institution was given.

Saskatchewan, with 21 out of 30 points, was the highest rated province/territory in the Audit with the grade of B+. Of the five standardized requests made to Saskatchewan government institutions, all five resulted in the release of responsive documents in full.

In terms of municipalities, the following Saskatchewan centres were graded as follows:

Saskatoon - 28 out of 30 points or A grade
Regina - 26 out of 30 points or A grade
Yorkton - 26 out of 30 points or A grade
Moose Jaw - 15 out of 30 points or C+ grade

There are very significant limitations to this study which only involved 315 requests across all provinces and territories. The number of requests to Saskatchewan government institutions or local authorities would have been a relatively small sample (only 26 in total). The report itself includes a section entitled *Assumptions/Limitations* and the statement:

While the results provide a measure of the degree to which institutions have cultures of openness and prioritize freedom of information as an institutional function, the reader should exercise caution in drawing conclusions about any individual institution's overall record solely from the results of this audit. No claim is made that the requests filed to each institution are representative of the overall performance of the institution in answering all requests it receives.

In addition, from our work, we know that the overall performance of our government institutions and local authorities would not likely be as high as the B+ rating in this report. There is still much work to be done to achieve a strong FOIP regime in our province. Nonetheless, this report confirms Saskatchewan is doing better and has made great strides since the original CNA report about five years ago that rated Saskatchewan as dead last among provinces and territories.

MORE CHANGES IN CANADA'S ACCESS AND PRIVACY OVERSIGHT COMMUNITY

Congratulations to **Elizabeth Denham**, the new British Columbia Information and Privacy Commissioner. Liz is wrapping up her responsibilities as Assistant Privacy Commissioner of Canada after demonstrating a large positive impact in PIPEDA compliance efforts.

Our best wishes to **Judy Haldeman** who is departing her post as Prince Edward Island Information and Privacy Commissioner. Judy is succeeded by **Maria MacDonald.**

PRIVACY AND SECURITY CONFERENCE SET FOR SEPTEMBER 2010

The Ministry of Justice and Attorney General, Access & Privacy Branch is proud to announce the *Saskatchewan Access, Privacy, Security and RM Forum—Making Connections* to be held September 27—29, 2010 at the Regina Inn. The Forum is intended for individuals working within public bodies across Saskatchewan, and is intended to build relationships, demonstrate the inter-connectivity of these disciplines, and improve the overall performance within these areas. The Forum has been strategically shaped to allow you to choose your own path while providing the best possible networking and professional development opportunities in one place.

DOCUDAVIT UPDATE

Since we published our *Advisory for Saskatchewan Physicians and Patients Regarding Out-Sourcing Storage of Patient Records* on March 10, 2010, DOCUdavit Solutions Inc. (DOCUdavit) has substantially revised its contract and privacy policy. We have provided advice and feedback on the amended documents directly to DOCUdavit.

We are awaiting word from DOCUdavit as to whether it will make the further changes recommended. In the meantime, we would caution Saskatchewan physicians and the executors of the estates of deceased physicians to consider our Advisory as still in effect.

SASKATCHEWAN HOSPITAL FUNDRAISING REGULATION

In April, the Minister of Health announced the new *Health Information Protection Amendment Regulations, 2010*. These new regulations will allow any regional health authority (rha) to disclose, without prior consent, certain personal health information (phi) to hospital foundations.

The phi would include three elements: (1) name of the patient; (2) contact information for the patient; and (3) fact that the patient had recently received service at an acute care facility in the region. It appears that, in addition, depending on the frequency that this information is disclosed to the foundations, it may convey information about whether the hospital visit is an isolated incident or whether the patient has a chronic condition and frequently attends hospital for treatment.

The patient will be allowed to opt-out, although the contract between the rhas and the foundations has not been revealed and we haven't yet seen the 'toolkit' being prepared by Saskatchewan Health.

Our recommendation to Saskatchewan Health and our rhas is that they continue to disclose phi to the foundations only after obtaining prior express consent from patients. Commissioner **Gary Dickson** has forwarded to all MLAs a letter clarifying what discussion has occurred between the Ministry and the OIPC. In addition, the Commissioner has issued a Report on the *Health Information Protection Amendment Regulations, 2010*. The concerns of our office include:

- *Diminished patient confidence in the electronic health record;*
- *Risks associated with personal health information being shared with fundraising organizations that are not subject to any major privacy law (federal or provincial) and for which there is no oversight by an independent Information and Privacy Commissioner or the Privacy Commissioner of Canada;*

(Continued on page 4)

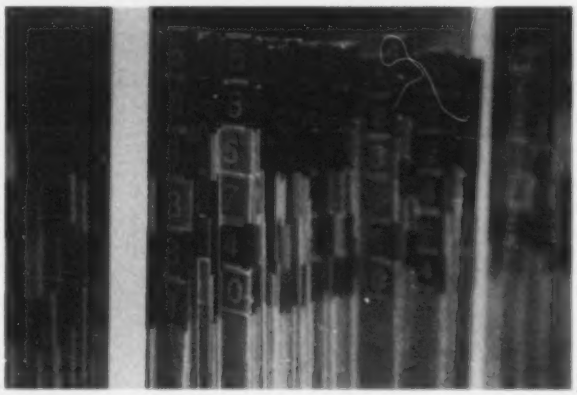
(Continued from page 3)

- *Likelihood of pressure from other health related non-profit organizations for the ability to use personal health information for their fundraising efforts;*
- *Lack of capacity for health information staff in RHAs to manage the significant new work created by the Regulation without compromising their general work in administering the region's extensive HIPA responsibilities;*
- *Risk of the Saskatchewan Government being found to have violated the Charter of Rights and Freedoms and the privacy interests of Saskatchewan patients;*
- *Risk that Saskatchewan patients will react negatively to the disclosure of personal health information to the foundations and reduce their support for those foundations as a result; and,*
- *Risk that the additional complexity created by the Regulation will undermine progress to date towards the goal of ensuring all Saskatchewan health care workers have a comfortable understanding of what they can and cannot do with the personal health information of patients.*

The OIPC Report is available at www.oipc.sk.ca under the *What's New* tab.

PERSONAL HEALTH RECORDS

The OIPC has, in past Annual Reports, urged that the Saskatchewan Government put a much higher priority on developing a patient portal or electronic personal health record (PHR) as part of its electronic health record initiative.



An April 2010 national survey in the U.S.A. – *Consumers and Health Information Technology: A National Survey* was undertaken by the California HealthCare Foundation. One interesting finding was that while 63% of PHR users are concerned generally about the privacy of their medical records, fewer than half say they worry about the privacy of the information in their PHR. This suggests that empowering patients by means of a PHR may partially address some of the concerns of patients.

For more information see: http://www.chcf.org/publications/2010/04/consumers-and-health-information-technology-a-national-survey.

DRAFT PRIVACY LEGISLATION IN U.S.A. CONGRESS

A new and interesting development in the U.S.A. is the release on May 3 of a draft Congressional bill that would enhance consumer privacy protections online and offline and establish a national framework for the collection, use and security of consumer information. This would displace current state law requirements.

The drafters are Congressmen **Rick Boucher** and **Cliff Stearns**. Mr. Boucher is the Chairman of the House Subcommittee on Communications, Technology and the Internet and Mr. Stearns is the subcommittee's ranking Republican. They have stated their intent is to promote the greater use of the Internet for e-commerce and cloud computing by giving consumers greater control over their privacy and promoting transparency regarding the collection, use and sharing of information.

(Continued on page 5)

(Continued from page 4)

We are grateful for the alert from **Kirsten Mathews** and her New York Proskauer law firm about this major development.

You can find more information at: http://www.proskauer.com/publications/client-alert/everybody-likes-free-stuff/.

YUKON COMMISSIONER LAUDS ACCESS & PRIVACY AMENDMENTS

Yukon Information and Privacy Commissioner, **Tracy-Anne McPhee**, in her latest Annual Report, is positive about eight specific amendments to that jurisdiction's *Access to Information and Protection of Privacy Act* (the Act). This includes a new requirement that there must be a comprehensive review of the Act every six years.

Yukon has joined most other Canadian jurisdictions that have a legislative requirement for a periodic review of their access and privacy law. Saskatchewan remains one of the few jurisdictions that has no such requirement despite the fact that our statute has been in force since 1992 and badly needs an overhaul. The Yukon Commissioner's Annual Report is available at www.ombudsman.yk.ca.

AUSTRALIA LAW REFORM EFFORTS

On World Press Freedom Day (May 3), commentators expressed mixed views on the apparent commitment of the Australian Government to reform its *Freedom of Information Act*. A Reform Bill is currently before the Australian Parliament. Although critics have identified a number of shortcomings, it significantly improves the existing access regime in that nation. Those shortcomings include no change in time limits, excessively weak requirements for proactive publication and failure to extend the Act to the administration of Parliament.

POLICE PROMOTE GREATER TRANSPARENCY IN WATERLOO, ONTARIO

Waterloo Regional Police have finally relented and released information on almost 5,000 calls for service between 2005 and 2008. This was in response to a request for electronic records under Ontario's *Municipal Freedom of Information and Protection of Privacy Act*. Details for 911 calls were very limited. For the other calls to police, details made available include the date and time of contact, the reason, the municipality and street and particulars about charges. The Police Service withheld names, addresses, and details about the charges. The Police Service has committed to promote greater transparency.

(Continued on page 6)

(Continued from page 5)

The Waterloo Regional Police website provides an interactive map that indicates recent police activity in various neighbourhoods. In contrast, municipal police forces in Saskatchewan are not subject to freedom of information laws despite past recommendations for such a change by the OIPC to align with almost all other Canadian provinces.

BRITISH COLUMBIA ANNOUNCES GUNSHOT AND STAB WOUND DISCLOSURE ACT

In late April, the Solicitor General for British Columbia announced that the far western province would follow the lead of provinces such as Saskatchewan and pass a new law. This law will require healthcare facilities to report gunshot and certain types of stab wounds to police. Our *Gunshot and Stab Wound Mandatory Reporting Act* is available at www.qp.gov.sk.ca. For those interested in OIPC advice and commentary when that initiative was first proposed in bill form, our letters to the Speaker of the Legislative Assembly are available at our website: www.oipc.sk.ca under the *What's New* tab.

MAYBE THE APPARENT GENERATION GAP OVER PRIVACY AND SOCIAL NETWORKING SITES IS EXAGGERATED

A study by researchers at the University of California (Berkeley) and the University of Pennsylvania suggests that young people do care about their privacy when they engage others online. The survey gathered information about attitudes towards privacy from 1000 Americans by phone. The conclusions of the authors are based on similarities in the degree to which both youth (between ages 18 and 24) and older people (over 65) indicated they had refused to give out information to a commercial operator since they considered it unnecessary or too personal. 84% of youth agreed that anyone who posts a photo or video of them on the Internet should first get the subject's permission. The percentage was 90 for those among 45 to 54 years of age. 40% of respondents in the youth range indicated that executives should receive prison sentences if their corporation used someone's personal information illegally. The percentage was very similar in the 35 to 44 year age range. A weakness of this interesting study is that it did not explore in detail what the various age groups considered as "too personal" or just where different age groups would draw the line between what is and isn't prejudicial. For the full report go to http://www.lakeresearch.com/.

NEW APPROACH TO PROTECTING PERSONAL HEALTH INFORMATION

Researchers at Vanderbilt University in Nashville have offered a new way to protect the privacy of patients as the world moves to electronic health records. The method apparently masks part of the records for any given patient that is not relevant to a specific inquiry. This involves an information scrubbing algorithm. The effect is to generalize a very large volume of clinical information so that the individual remains anonymous, but to still allow useful data for the work of researchers by ensuring that the data is limited to only that data that is relevant to the particular subject. The full article is available at: http://www.pnas.org/content/early/2010/04/05/0911686107.abstract.

YET MORE PERSONAL HEALTH INFORMATION NEWS

On May 4, 2010, **Huping Zhou** of Los Angles became the first person sentenced to prison for misdemeanour offences under the U.S.A. *Health Insurance Portability and Accountability Act* for improperly using confidential records of a patient without a valid reason or authorization.

Zhou, a former UCLA Healthcare System employee, who admitted snooping in patients' records was sentenced to four months in prison. In an article in the *HealthLeaders Media* **Kate Borten**, CISSP, CISM, observed that:

> *"The fact that e-records can be accessed from anywhere is both a blessing and a privacy and security curse".* Borten also stated: *"Today the standard approach-after technically blocking access from those who don't need it, of course-is to have a policy prohibiting snooping and sanctions for violations, workforce training that makes this crystal clear, and then follow-through with technical and manual auditing and disciplinary action."*

In the same article, a health law partner in a Dallas law firm is quoted as suggesting that organizations need to sniff out snooping themselves, and fire people to scare the rest of the staff. To view the article see: www.healthleadersmedia.com/content/HR-250784/Experts-Train-Employees-Not-To-SNoop-Fire-Those-Who-Do

MARK YOUR CALENDAR!

June 9—11, 2010: *2010 Access and Privacy Conference,* Marriott Hotel, River Cree Resort, Edmonton, Alberta. For more information, visit www3.extension.ualberta.ca/accessandprivacy/

June 22, 2010: *The Institute of Internal Auditors (The Saskatchewan Chapter) presents "Managing Privacy Risk: Privacy Best Practices, Privacy Impact Assessments, and Privacy Audits".* For more information, visit www.theiia.org/chapters/pubdocs/172/2010_IIA_22June10_Regina_registration_form1.pdf

September 20, 2010: Mark your calendars for the *CBA National Privacy and Access Law Conference,* Ottawa, Ontario. Details to follow in a future issue of the *FOIP Folio.*

September 27—29, 2010: *Saskatchewan Access, Privacy, Security and Records Management Forum 2010—"Making Connections",* Regina Inn, Regina, Saskatchewan. For more information, visit www.verney.ca/sk2010

Sunshine, barbecues, vacations, football season... summertime is just around the corner in Saskatchewan!

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